

In the Matter of the Compensation of  
**ROBERT CHASE, Claimant**  
WCB Case No. 21-04311  
ORDER ON REVIEW  
Jodie Phillips Polich, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey, Ceja, and Wold. Member Curey dissents.

Claimant requests review of Administrative Law Judge (ALJ) Wren's order that did not award permanent disability benefits for abrasions on the left side of the face and post-concussive syndrome, whereas an Order on Reconsideration had awarded 10 percent whole person impairment. On review, the issue is extent of permanent disability (permanent impairment). We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary and supplementation.

On February 26, 2019, claimant, a truck driver, was compensably injured when a 200-pound steel beam struck him in the left side of the face, and he suffered a brief loss of consciousness. (Exs. 4-1, 6, 20-1, 29-2, 36-5, 46-1-2). Claimant sought treatment that day for dizziness, vertigo, nausea, and an abrasion to the left side of his face. (Ex. 4-1, -4). A CT scan, interpreted by Dr. Ozgur, radiologist, showed no abnormal findings suggestive of hemorrhage or infarction. (Ex. 4-3). Dr. Hollinger, an Emergency Department physician, reported no objective evidence of an acute process requiring urgent intervention or hospitalization. (Ex. 4-4). He noted that claimant's symptoms (*i.e.*, vertigo, nausea, and dizziness) were consistent with an acute concussion. (*Id.*) Claimant was diagnosed with a closed head injury, concussion, post-concussion syndrome, and vertigo, and was taken off work. (*Id.*)

On March 1 and March 15, 2019, claimant was seen for follow-up by Dr. Baertlein, his attending physician. (Exs. 5, 8). He reported headaches, neck and upper back pain, and episodes of vertigo and balance issues. (Exs. 5-1, 8-1). Dr. Baertlein diagnosed post-concussion syndrome and a cervical strain. (Ex. 8-1). In his March 15, 2019, chart note, he noted that claimant's symptoms were improving. (*Id.*)

On April 23, 2019, the SAIF Corporation accepted claimant's injury claim for a concussion and cervical strain. (Ex. 11).

On June 24, 2019, Dr. Baertlein documented claimant's reports that his neck pain had essentially resolved, but that he still had some issues with memory. (Ex. 13-1). Dr. Baertlein continued to diagnose post-concussion syndrome, released claimant to regular work, and agreed with claimant's desire to obtain a consultation with a concussion specialist. (*Id.*)

From July to October 2019, claimant treated with Dr. Nelson, a chiropractic neurologist, for ongoing complaints of cognitive, autonomic, memory, and emotional difficulties, mental and physical fatigue, poor sleep, balance problems, nausea and dizziness, and headaches. (Exs. 14, 18, 19, 20, 21, 24 through 28, 31).

On October 10, 2019, Dr. Wicher, who performed a neuropsychological evaluation at SAIF's request, found no evidence of a neurocognitive disorder related to claimant's work injury, and stated that the mechanism of claimant's injury was inconsistent with his persistent cognitive impairment. (Ex. 29-11). Dr. Wicher opined that claimant's accepted concussion had resolved without permanent impairment, and that he was capable of performing his regular work. (Ex. 29-13-14). Dr. Baertlein concurred with Dr. Wicher's report. (Ex. 32).

A November 14, 2019, Notice of Closure did not award permanent disability benefits. (Ex. 33). A February 13, 2020, Order on Reconsideration modified the temporary disability benefits awarded in the closure notice, but did not award permanent disability benefits. The February 13, 2020, Order on Reconsideration was not appealed.

Thereafter, claimant began treating with Dr. Chan, a family medicine physician, for his uncontrolled diabetes, as well as complaints of tremors/shaking, and ongoing problems with balance, memory, and headaches. (Exs. 40-1, 43, 50, 53). In March 2021, Dr. Skordilis, who performed a neurology consultation at Dr. Chan's request to evaluate claimant's tremors following his injury and post-concussive syndrome, noted claimant's ongoing complaints of balance issues and memory loss. (Ex. 41-2). Dr. Skordilis found no clear etiology for claimant's tremors. (Ex. 41-6).

On May 6, 2021, Dr. Almaraz examined claimant at SAIF's request to address the newly requested conditions. (Ex. 46). He noted that claimant's current condition was worse than it had been at the time of the February 2019 injury, and

that claimant still complained of dizziness, shaking, balance problems, and feeling “loopy” some days. (Ex. 46-7). Evaluating claimant’s mental status, Dr. Almaraz stated that he was alert and oriented, had fluent spontaneous language, no confusion or amnesia, and was able to recall details surrounding his work injury. (Ex. 46-9).

According to Dr. Almaraz, claimant’s complaints of worsening headaches and memory issues were atypical for the usual known course of a concussion, and there were no significant neurological findings indicative of a progressive or degenerative brain disease and no residuals related to the work injury. (Ex. 46-10). He opined that claimant’s post-concussive syndrome resolved on March 29, 2019, and that the return of symptoms thereafter was inconsistent with the “known time course of concussion” and, instead, pointed to “a strong possibility that there are psychogenic factors playing a role in his clinical condition.” (Ex. 46-11). He concluded that the post-concussive syndrome and facial abrasion were medically stationary without impairment, and that claimant was capable of performing his regular work. (Ex. 46-12). Dr. Baertlein concurred with Dr. Almaraz’s opinion. (Ex. 49).

On May 18, 2021, SAIF accepted claimant’s new/omitted medical condition claim for abrasions on the left side of the face and post-concussive syndrome. (Ex. 48).

A June 2, 2021, Notice of Closure did not award any permanent disability benefits for the post-concussive syndrome or abrasions to the left face. (Ex. 52). Claimant requested reconsideration of the closure notice, and the appointment of a medical arbiter. (Ex. 55).

On September 7, 2021, Dr. Koon performed a medical arbiter evaluation, focusing on claimant’s accepted post-concussive syndrome. (Ex. 59). He documented claimant’s complaints of poor balance, poor sleep, poor concentration and attention, poor memory, intermittent dizziness, and tremors. (Ex. 59-3). According to Dr. Koon, the exact medical reason for claimant’s ongoing symptoms was unknown, and it would be unusual to have rapidly worsening symptoms post-concussion. (Ex. 59-5). He noted that other diagnoses (including psychosocial) could not be ruled out. (*Id.*) He then addressed the Appellate Review Unit’s (ARU’s) specific questions regarding cranial nerve impairment, brain impairment, impairment from the accepted abrasions on the left side of the face, validity, and apportionment. (Exs. 58, 59-5).

Regarding cranial nerve impairment, Dr. Koon reported that claimant scored 29/30 on a mini-mental status examination, but could not recall one-third of items after five minutes. (Ex. 59-5). He further noted that claimant was slow with his responses but was able to complete the examination, and that his “[c]ranial nerve 1-12 was intact.” (*Id.*) Dr. Koon stated that, on the basis of those tests, he found no evidence of impairment due to the accepted post-concussive syndrome or direct medical sequelae. (*Id.*)

Regarding brain injury impairment, Dr. Koon noted that he could not attribute claimant’s endorsement of multiple symptoms to the accepted post-concussive syndrome. (Ex. 59-5). Nevertheless, he stated that claimant had Class 1 brain injury impairment. (*Id.*) Dr. Koon found no permanent loss of use or function due to the left facial abrasion. (*Id.*) Although he noted that claimant’s clinical presentation was unusual, Dr. Koon stated that the findings were valid. (*Id.*) He attributed 10 percent of the findings to the accepted post-concussive syndrome, and the remaining 90 percent to “some unknown diagnosis, psychosocial issues, Parkinson like features.” (*Id.*)

Thereafter, the ARU requested additional information from Dr. Koon. (Ex. 60). Referring to various statements in his report (*i.e.*, that the exact medical reason for claimant’s ongoing symptoms was unknown, that he could not attribute claimant’s endorsement of multiple symptoms to the accepted condition, that claimant had Class 1 brain injury impairment, and that the findings were valid and 10 percent attributable to the accepted post-concussive syndrome), the ARU asked Dr. Koon to confirm whether claimant’s Class 1 brain injury impairment was due in any part to the newly accepted condition or direct medical sequelae. (Ex. 60-1). Dr. Koon indicated “Yes,” and stated, “The patient has symptoms that are consistent with post concussion. Subjectively, he feels disabled, but I believe he could experience mild symptoms from the accepted condition → Class 1.” (*Id.*)

A September 17, 2021, Order on Reconsideration modified the closure notice to award 10 percent whole person impairment for the accepted post-concussive syndrome. (Ex. 61-3-4). That award was based on Dr. Koon’s medical arbiter report and subsequent confirmation that claimant had Class 1 brain impairment. (Ex. 61-3). SAIF requested a hearing, challenging the permanent disability award.

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## CONCLUSIONS OF LAW AND OPINION

The ALJ found Dr. Koon's opinion ambiguous and unpersuasive because: (1) his statement that he could not find any evidence of impairment due to the accepted post-concussive syndrome was inconsistent with his later statement that claimant had Class 1 brain injury impairment; (2) his clarification statement that claimant "could experience mild symptoms from the accepted condition → Class 1" was expressed in terms of possibility (rather than medical probability); (3) he did not address the possibility that other psychogenic factors contributed to claimant's worsening symptoms, as noted by Dr. Almaraz; and (4) his focus on the accepted "post-concussion" syndrome indicated that he thought he had to relate some impairment to the accepted condition. The ALJ also found Dr. Almaraz's opinion, with which Dr. Baertlein concurred, to be more accurate in rating claimant's permanent disability. Accordingly, the ALJ reduced the 10 percent whole person impairment award, as granted by the Order on Reconsideration, to zero.

On review, claimant contends that Dr. Koon's medical arbiter report should be used to rate his permanent disability, and that a preponderance of medical evidence does not demonstrate that the different findings of Dr. Almaraz, with whom Dr. Baertlein concurred, are more accurate and should be used. For the following reasons, we agree.

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). However, as the party challenging the Order on Reconsideration, SAIF has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000).

Where, as here, a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012).<sup>1</sup> Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter's findings. *See Hicks v. SAIF*, 194 Or App 655, *recons*, 196 Or App 146, 152 (2004); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130-31 (1994); *Douglas E. Rivas*, 71 Van

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<sup>1</sup> Because the Notice of Closure issued June 2, 2021, the applicable standards are found in WCD Admin. Order 20-051 (eff. March 1, 2020). *See* OAR 436-035-0003(1), (4).

Natta 1029, 1029 (2019). Where the attending physician has provided an opinion of impairment and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician's impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

A worker is eligible for an award of impairment if they suffer permanent loss of use or function established by a preponderance of medical evidence based on objective findings, and the loss was caused in material part by the compensable injury. OAR 436-035-0007(1)(a); OAR 436-035-0013(1). Establishing that an injured worker has suffered impairment does not automatically establish that the worker is entitled to compensation for all new findings of loss. Instead, each distinct loss of use or function is still subject to the material contributing cause standard. *Robinette v. SAIF*, 369 Or 767, 783 (2022). An injured worker is entitled to the full measure of impairment, even if a portion of the impairment is attributable to a previously denied or noncompensable condition, when the accepted condition is a material contributing cause of the disability or impairment, and the carrier has not followed the statutory process of accepting and denying a "combined condition." *Johnson v. SAIF*, 369 Or 569, 600-01 (2022). On the other hand, if the loss of use or function of a body part or system is not caused in any part by the compensable injury, the loss is not due to the compensable injury and the worker is not eligible for an impairment award. See OAR 436-035-0007(1)(b)(C); *Robinette*, 369 Or at 784; *Tanya M. Jones*, 72 Van Natta 1122, 1127 (2020).

Here, Dr. Koon, the medical arbiter, documented claimant's complaints of poor balance, poor sleep, poor concentration and attention, poor memory, intermittent dizziness, and tremors. (Ex. 59-3). Focusing his examination solely on the accepted post-concussive syndrome, Dr. Koon stated that the exact medical reason for claimant's ongoing symptoms was unknown, and that it would be unusual to have rapidly worsening symptoms post-concussion. (Ex. 59-5). He noted that other diagnoses (including psychosocial) could not be ruled out. (*Id.*) He was provided with instructions to evaluate claimant's head/brain and face, as well as the criteria for evaluating brain injury impairment and the specific classification descriptions for "brain impairment," and asked to evaluate and address permanent impairment findings of the cranial nerves, as well as the "brain impairment" classification criteria. (Exs. 58, 59-5).

For the cranial nerve impairment, Dr. Koon noted that claimant scored 29/30 on a mini-mental status examination but could not recall one-third of items after five minutes, and that he was slow with his responses but was able to complete the examination. (Ex. 59-5). Dr. Koon reported that claimant's "[c]ranial nerve 1-12 was intact" and, on the basis of those tests, found no evidence of impairment due to the accepted post-concussive syndrome or direct medical sequelae. (*Id.*)

Addressing the "brain impairment" evaluation and classification criteria, Dr. Koon could not attribute claimant's endorsement of multiple symptoms to the accepted post-concussive syndrome but, nevertheless, placed him in the "brain impairment" Class 1 category. (Ex. 59-5). Although he noted that claimant's clinical presentation was "unusual," Dr. Koon considered the findings to be valid and attributed 10 percent of the findings to the post-concussive syndrome, and the remaining 90 percent to "some unknown diagnosis, psychosocial issues, Parkinson like features." (*Id.*) Responding to the ARU's request for clarification to confirm if claimant's Class 1 "brain injury" impairment was due in any part to the accepted post-concussive syndrome or direct medical sequelae, Dr. Koon indicated "Yes," and explained, "The patient has symptoms that are consistent with post concussion. Subjectively, he feels disabled, but I believe he could experience mild symptoms from the accepted condition → Class 1." (Ex. 60-1).

When read in context, Dr. Koon's opinion establishes that, while he found no evidence of "*cranial nerve*" impairment due to the accepted post-concussive syndrome, and although he could not attribute claimant's endorsement of "multiple symptoms" to the accepted condition, claimant did have symptoms that were consistent with post-concussive syndrome and (despite claimant's subjective feeling that he was disabled) Dr. Koon believed he could experience mild symptoms from the accepted condition that would be categorized as Class 1 "*brain impairment*." (Exs. 58, 59-5, 60-1). We find that Dr. Koon's opinion unambiguously supports a conclusion that claimant has Class 1 "brain impairment" under the criteria set forth under OAR 436-035-0390(10).<sup>2</sup> See *SAIF v. Strubel*,

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<sup>2</sup> OAR 436-035-0390(10) describes the consideration of residuals/impairments for Class 1 "brain impairment" as follows:

"(1) For cognition, the worker is independent in activities of daily living (ADL); if there are cognitive or memory deficits, they are no more than minimal or 'nuisance' level, and do not materially impair ADL, or the type of work the worker may perform;

"(2) For language, if there is a language deficit, it is no more than minimal (*e.g.*, language comprehension or production might be less than normal, but it is adequate for daily living);

161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole); *see also Terri Tyler*, 74 Van Natta 237, 240 (2020) (when read in context, the medical arbiters' opinion persuasively established that the claimant had Class 1 brain impairment).

Specifically, Dr. Koon described claimant's subjective complaints of poor balance, poor sleep, poor concentration and attention, poor memory, and intermittent dizziness, which were consistent with contemporaneous medical reports diagnosing post-concussive syndrome. (Exs. 4, 5, 8, 10, 13, 14, 16, 17, 19, 20, 21, 24 through 28, 31, 59-3). He also noted that claimant was unable to recall one-third of items after five minutes during the mini-mental status examination, and observed that claimant was slow in his responses, although able to complete the examination. (Ex. 59-5). Thus, we are persuaded that Dr. Koon identified claimant's symptoms that relate to the OAR 436-035-0390(10) criteria of cognition (minimal or "nuisance" level cognitive or memory deficits), language ("production might be less than normal but it is adequate for daily living"), sleep/alertness (sleeping irregularity that does not interfere with daily living), and episodic neurologic disorder (disturbances of balance) in concluding that claimant had Class 1 "brain impairment." Accordingly, we find that Dr. Koon's opinion established the existence and severity of claimant's claimed residual symptoms based on objective findings through "observation or examination or a preponderance of evidence," and considered those residuals to be "within the range reasonably considered to be *possible*" given the nature of claimant's work injury, consistent with OAR 436-035-0390(10)(a) (emphasis added).<sup>3</sup> *See* ORS 656.005(19)

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"(3) For emotions/behavior, if there are emotional disturbances or personality changes, they are minimal and occur only transiently during stressful situations and events;

"(4) For sleep/alertness, if there are episodic sleep disturbances, fatigue, or lethargy, they are minimal (*e.g.*, any sleeping irregularity, fatigue, or lethargy does not interfere with daily living);

"(5) For episodic neurologic disorder, if there is an episodic neurologic disorder (*i.e.*, any type of seizure disorder; vestibular disorder, including disturbances of balance or sensorimotor integration; neuro-ophthalmologic or oculomotor visual disorder, such as diplopia; headaches), it is completely controlled and does not interfere with daily living."

The fundamental intent of this class is as follows: (1) ADL: The worker has "nuisance" level residual effects of head injury, which may slightly impact the manner in which ADL are performed, or the subjective ease of performance, but the worker remains fully independent in all ADL; (2) Work capacity: The "nuisance" level residuals may impact the manner in which the worker performs work tasks, or the subjective ease of performance, but the worker is not materially limited in the types of work which can be performed, as compared with pre-injury abilities. OAR 436-035-0390(10).

<sup>3</sup> Because the standards require that the existence and severity of the claimed residuals and impairments for rating "brain impairment" be "within the range reasonable considered to be *possible*," we



(“Objective findings” are defined as “verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength, and palpable muscle spasms,” and do not include “physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable.”); *see also SAIF v. Lewis*, 335 Or 92, 98-100 (2002) (where a physician bases a medical opinion on a patient’s symptoms, the physician may rely on, among other things, self-reports of symptoms, so long as those symptoms are capable of being verified).

Furthermore, Dr. Koon’s statement that claimant *subjectively* felt disabled, while Dr. Koon believed claimant could experience mild symptoms from the post-concussive syndrome, is consistent with the fundamental intent of Class 1 “brain impairment.” That is, “the worker has ‘nuisance’ level residual effects of head injury, which *may* slightly impact the manner in which ADL are performed, or the *subjective* ease of performance, but the worker remains fully independent in all ADL;” and “the ‘nuisance’ level residuals *may* impact the manner in which the worker performs work tasks, or the *subjective* ease of performance, but the worker is not materially limited in the types of work which can be performed, as compared with pre-injury abilities.” OAR 436-035-0390(10) (emphases added).<sup>4</sup>

In reaching this conclusion, we acknowledge that Dr. Koon did not specifically respond to Dr. Almaraz’s opinion that claimant’s worsening symptoms were inconsistent with the “known” time course for concussions and “point[ed] to a strong possibility that there are psychogenic factors playing a role in his clinical condition.” (Ex. 46-11). However, a medical arbiter is under no obligation to comment on another physician’s assessment of a claimant’s impairment. *See Justin D. Morris*, 65 Van Natta 334, 337 (2013); *Lourdes Brown*, 60 Van Natta 2065, 2067 (2008). In any event, Dr. Koon acknowledged that claimant’s worsening symptoms and clinical presentation were “unusual” for post-concussive syndrome, but nevertheless stated that the impairment findings were valid and

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do not find that Dr. Koon’s statement that claimant “*could* experience mild symptoms from the accepted condition” renders his opinion unpersuasive. (Emphases added); *compare Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (use of the words “could” and “can” militated against a finding of medical probability).

<sup>4</sup> Although Dr. Koon apportioned 90 percent of claimant’s Class 1 “brain impairment” to conditions other than the accepted condition and its direct medical sequela, there was no “pre-closure” acceptance and denial of a “combined condition.” Because claimant’s accepted post-concussive syndrome is a material cause of his Class 1 “brain impairment,” Claimant is entitled to receive compensation for the full measure of that impairment without apportionment. *See Caren v. Providence Health Sys. Or.*, 365 Or 466, 486-87 (2019); *Johnson*, 369 Or at 602-03; *Alicia Bermejo-Flores*, 71 Van Natta 1264 (2019).

confirmed that the accepted condition was, in part, a material contributing cause of claimant's Class 1 "brain impairment." (Exs. 59-5, 60-1). Moreover, Dr. Koon considered other potential causes of claimant's impairment, including psychogenic factors. Specifically, he attributed 90 percent of claimant's impairment to psychosocial issues, unknown diagnoses, and Parkinson-like features. (Ex. 59-5). Under such circumstances, we decline to discount Dr. Koon's opinion on the basis that it did not respond to Dr. Almaraz's opinion.<sup>5</sup>

In contrast, we do not find Dr. Almaraz's impairment findings to be more accurate than those of Dr. Koon. Specifically, Dr. Almaraz evaluated claimant for the purpose of addressing the compensability of the claimed post-concussive syndrome, not to determine the extent of his "brain impairment." (Ex. 46). Moreover, in concluding that there was "no basis for any neurological ratable impairment related to the work injury[.]" there is no indication that Dr. Almaraz reviewed or considered the "brain impairment" criteria and classifications set forth in OAR 436-035-0390(10), nor did he address those criteria or the fundamental intent of the classifications in any respect. (Ex. 46-10); *see Brandy C. Aguirre*, 71 Van Natta 1073, 1076, *recons*, 71 Van Natta 1209, 1210 (2019) (physicians' opinions that found no "brain impairment" unpersuasive where the physicians neither explained why the claimant's symptoms did not constitute permanent impairment, nor addressed/considered the OAR 436-035-0390 "brain impairment" criteria).

Finally, although Dr. Baertlein concurred with Dr. Almaraz's opinion, Dr. Baertlein had not examined claimant since June 2019. (*See* Ex. 13). Based on the foregoing reasons, we find no persuasive reason to conclude that Dr. Almaraz's findings, with which Dr. Baertlein concurred, preponderate over Dr. Koon's medical arbiter report. *See* OAR 436-035-0007(5); *Tyler*, 74 Van Natta at 240.

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<sup>5</sup> SAIF asserts that Dr. Koon erroneously assumed that he was required to relate some impairment to the accepted condition based on the following statement: "The exact medical reason for the worker's ongoing symptoms [is] unknown. At this point, he has an accepted condition of post[-]concussion syndrome and this arbiter exam will focus on this condition solely." *See* Ex. 59-5. We disagree with SAIF's assertion.

First, Dr. Koon's focus on the accepted condition is consistent with the appropriate standard for measuring claimant's permanent impairment. *See Kruhl v. Foremans Cleaners*, 194 Or App 125, 130 (1994) (only findings of impairment that are permanent and caused by the accepted condition and its direct medical sequelae may be used to rate impairment). Moreover, as discussed above, Dr. Koon subsequently clarified his statement that the "cause of claimant's ongoing symptoms was unknown," confirming that 10 percent of claimant's impairment findings were due to the accepted condition. *See* Exs. 59-5, 60-1). Under such circumstances, we do not interpret Dr. Koon's statement to indicate that he thought he had to relate some impairment to the accepted condition.

For the reasons explained above, SAIF has not met its burden of establishing error in the reconsideration process. *Callow*, 171 Or App at 183-84. Claimant has met his burden of proving that he is entitled to a 10 percent impairment value for Class 1 “brain impairment.” OAR 436-035-0390(10). Consequently, the ALJ’s order is reversed. The September 17, 2021, Order on Reconsideration is reinstated and affirmed.

Because SAIF requested a hearing regarding the Order on Reconsideration, and because we have found that all or part of the compensation awarded to claimant should not be disallowed or reduced, claimant’s attorney is entitled to an assessed attorney fee for services at hearing and on review. ORS 656.382(2); *SAIF v. DeLeon*, 352 Or 130, 143 (2012); *Jack W. Hill*, 65 Van Natta 1929 (2013); *Justin D. Morris*, 65 Van Natta 334, 337-40 (2013) (*en banc*). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services at the hearing level and on Board review is \$11,750, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant’s appellate briefs, and his counsel’s uncontested fee submission), the complexity of the issues, the value of the interests involved, the risks that counsel may go uncompensated, and the contingent nature of the practice of workers’ compensation law.

### ORDER

The ALJ’s order dated February 1, 2022, is reversed. The September 17, 2021, Order on Reconsideration is reinstated and affirmed. For services at the hearing level and on review, claimant’s attorney is awarded an assessed attorney fee of \$11,750, to be paid by SAIF.<sup>6</sup>

Entered at Salem, Oregon on January 27, 2023

The majority concludes that claimant is entitled to a Class 1 brain impairment rating based on the findings of Dr. Koon, the medical arbiter. Because I would conclude that the findings of Dr. Almaraz, with which the attending physician concurred, are more accurate than those of Dr. Koon, I respectfully dissent.

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<sup>6</sup> This fee is in addition to the attorney fee awarded in the reconsideration order.

Here, Dr. Koon documented claimant's complaints of poor balance, poor sleep, poor concentration and attention, poor memory, intermittent dizziness, and tremors. (Ex. 59-3). According to Dr. Koon, "the exact medical reason for [claimant's] ongoing symptoms are unknown[,] and it was "unusual for worsening, rapidly progressive symptoms for post-concussion but other diagnoses including psychosocial cannot be ruled out." (Ex. 59-5). Based on a mini-mental status examination (during which claimant scored 29/30, could not recall one-third of items after five minutes, and was slow with responses but able to complete the examination), as well as intact cranial nerve testing, Dr. Koon did not find "any evidence of impairment" due to the accepted post-concussive syndrome or direct medical sequelae. (*Id.*) Dr. Koon also noted that claimant endorsed multiple symptoms, which he could not attribute to the accepted condition, and considered claimant's clinical presentation to be unusual. (*Id.*) Nevertheless, Dr. Koon stated that the impairment findings were valid and concluded that claimant had Class 1 "brain impairment," with 10 percent of the findings due to the accepted post-concussive syndrome (and the remaining 90 percent due to "some unknown diagnosis, psychosocial issues, Parkinson like features.") (*Id.*)

Thereafter, the Appellate Review Unit (ARU) requested additional information from Dr. Koon. (Ex. 60). Referring to various statements in his report (*i.e.*, that the exact medical reason for claimant's ongoing symptoms was unknown, that he could not attribute claimant's endorsement of multiple symptoms to the accepted condition, that claimant had Class 1 brain injury impairment, and that the findings were valid and 10 percent attributable to the accepted post-concussive syndrome), the ARU asked Dr. Koon to confirm whether claimant's Class 1 brain injury impairment was due in any part to the newly accepted condition or direct medical sequelae. (Ex. 60-1). Dr. Koon indicated, "Yes," and stated, "The patient has symptoms that are consistent with post concussion. Subjectively, he feels disabled, but I believe he could experience mild symptoms from the accepted condition → Class 1." (*Id.*)

Despite Dr. Koon's clarification that claimant "could experience mild symptoms from the accepted condition," he did not indicate which symptoms satisfied the Class 1 "brain impairment" criteria set forth in OAR 436-035-0390(10). (Ex. 60-1). Moreover, Dr. Koon did not address or reconcile his statements that he did not find "any evidence of impairment" due to the accepted post-concussive syndrome and that he could not attribute claimant's endorsement of multiple symptoms to the accepted condition with his ultimate conclusion that claimant had Class 1 "brain impairment" due, in part, to the accepted condition. (Exs. 59-5, 60-1). In the absence of further explanation, I would find Dr. Koon's

opinion to be ambiguous. *See Brandy C. Aguirre*, 71 Van Natta 1073, 1076, *recons*, 71 Van Natta 1209, 1210 (2019) (medical arbiter panel’s opinion found ambiguous and unpersuasive where the panel did not indicate or explain how the claimant’s symptoms were considered under the criteria set forth in OAR 436-035-0390 to determine “brain impairment” (or lack thereof)).

In contrast, I would find Dr. Almaraz’s findings, with which Dr. Baertlein concurred, to be more accurate than those of Dr. Koon. (Exs. 46, 49). Dr. Almaraz did not find evidence of residual impairment due to claimant’s post-concussive syndrome, and considered claimant’s complaints of worsening of symptoms (approximately two years after his initial post-concussive symptoms resolved) to be inconsistent with a concussion or post-concussion and, rather, suggestive of a psychogenic factor. (Ex. 46-10-11). Dr. Almaraz concluded that claimant had no ratable impairment due to his post-concussive syndrome. (Ex. 46-12). Unlike the opinion of Dr. Koon, Dr. Almaraz’s opinion was clear, internally consistent, and unambiguous.

Based on the foregoing reasoning, I would conclude that the record does not establish claimant’s entitlement to a Class 1 “brain impairment” permanent disability award. Thus, I would find that SAIF has met its burden of proving error in the reconsideration process. *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000). Because the majority concludes otherwise, I dissent.